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Supreme Court, U.S.
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No. 00-71

IN THE

Supreme Court of the United States

MEAD JOHNSON & CO.,

Petitioner,

v.

ABBOTT LABORATORIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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The perception of consumers is the *sine qua non* for determining what message is implied by an advertising claim. It is this fundamental and seemingly straightforward principle that the Seventh Circuit in this case has upended. Abbott, in its Brief in Opposition to Mead Johnson's Petition, attempts to obscure that simple point, ignoring the plain language of the appellate court's decision and contending that, instead, what this case is about is *how* the claim must be substantiated, a question that Abbott rightly notes is the provence of experts, not of consumers. Yet, whether the claim "1st Choice of Doctors" for Abbott's infant formula Similac says anything about the number or percentage of doctors who choose Similac first is not a technical question concerning how a survey must be conducted. What that phrase — which "ingeniously"[1] leaves open the question of quantity by failing to specify "some," or "most," or "all" — communicates must be determined by those for whom the message is intended. Despite Abbott's contentions, this is what the uniform caselaw *and* the practice of the Federal Trade Commission ("FTC") mandate, and what the Seventh Circuit now has rejected.

To accept Abbott's argument is to ignore the broad language of the Seventh Circuit's decision, which rejected as legal error any reliance on "the first impressions of people on the street," ignored the fundamental ambiguity of the claim "1st Choice of Doctors," and held that, where a claim is, in the court's view, "objectively verifiable," consumer understanding of the claim's meaning has no place.

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1. App. D at 26a.

THE COURT'S RULING IS FAR BROADER THAN ABBOTT SUGGESTS.

Ignoring the key finding by the district court judge that the claim "1st Choice of Doctors" is "deeply — and almost ingeniously — ambiguous" (App. D at 26a), Abbott contends that the consumer perception survey was used essentially to determine what level of substantiation for that claim was necessary — an issue that Abbott characterizes as a "how" question, as in "how" the claim must be substantiated. This question, it argues, belongs with research experts, not consumers. The appellate decision, Abbott argues, simply rejected this use of consumer research as inappropriate.

But the Seventh Circuit decision, and Abbott's opposition to the Petition, ignore a fundamental ambiguity in the "1st Choice of Doctors" claim. Abbott's advertising claim is silent on how many doctors consider Similac their first choice. The generic reference to "Doctors," with no quantitative qualification, reasonably can be understood to be a reference to all or most doctors. Indeed, Abbott's previous claim on the same product had been "1st Choice of More Doctors." By deleting the quantitative modifier, and by using the claim in the context of advertising copy that referred to the expertise of "doctors" generally (App. D at 35a), Abbott created an ambiguity regarding the extent of doctor preference for its formula. Is Similac the first choice of most doctors? of all doctors? of any number of doctors? of a plurality of doctors?

The question explored by the consumer survey was not "how" but "what"? What message was being conveyed to consumers through the use of the unqualified and ambiguous phrase "1st Choice of Doctors?" It is to answer that question that the survey was conducted.[2]

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2. Aside from its criticism of the consumer survey, Abbott's characterization of the results of the *doctor* studies in evidence before

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Despite Abbott's efforts to narrow the scope of the appellate court's decision in the hope of defeating this petition, the breadth of the language used by Judge Easterbrook speaks for itself. The Seventh Circuit ruled unambiguously that consumer survey evidence — "the first impressions of people on the street" — is legally irrelevant to "determine the meaning of words, or to set the standard to which objectively verifiable claims must be held" in the context of a charge that advertising is false or misleading. (App. C at 14a.) Rather than rely on consumer surveys to determine the meaning of objectively verifiable words, the court said, the more appropriate approach is to rely on dictionaries and lexicographers. "It would be a bad idea to replace the work of these professionals with the first impressions of people on the street, especially because consumers' sketchy understanding of science means that survey results are apt to present firms with unrealistic demands for verification." (App. C at 15a.) Thus, the appellate court clearly ruled that an advertiser's obligation to substantiate its claim should not depend on the perceptions of consumers regarding the meaning the claim conveys. That ruling stands in stark contrast to the rulings of 20 years of Lanham Act jurisprudence that the perceptions of consumers are relevant to determining what implied claims are conveyed in advertising.

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the district court, Opp. Brief at 4-7, was flawed and incomplete. As the district court painstakingly explained, most of the physician surveys purporting to show a majority preference for Similac calculated that percentage by ignoring those respondents who stated that they had no preference. In other words, the "majority" reflected in Abbott's recitations frequently represented a majority of that subset who professed a preference, not of all doctors surveyed. Other surveys were rejected for a number of procedural or structural deficiencies. (*See* App. D at 50a-80a.) In any event, the proper understanding of the physician surveys' results presented questions of fact for the district court that are not directly implicated in the disposition of this Petition.

ABBOTT MISUNDERSTANDS THE FEDERAL TRADE COMMISSION'S APPROACH IN THIS AREA.

The standard articulated by the courts in the context of the Lanham Act dovetails precisely with that embraced by the FTC in dealing with deceptive advertising. That agency, like the courts, applies the yardstick of consumer perception to determining whether a claim is misleading. The difference between the courts and the agency is not the standard by which a claim is measured, but the appropriate burdens of proof used to reach a conclusion. Unlike the courts, which lack specialized expertise in this area and therefore generally depend on results of actual consumer research to inform their decisions, the FTC itself is expert in understanding consumers' reactions to claims and, thus, can "stand in the shoes" of those consumers for the purposes of its decision-making. In both the *Gerber Products* and *Standard Brands* proceedings (*see* Petition at 23-24), the agency surmised how it believed consumers would understand the doctor endorsement claims in question, on that basis concluding that they were misleading and had to be discontinued.

CONCLUSION

The uniform standard utilized by all decisors in evaluating advertising has rested on the touchstone of consumer perception. Simply put, a claim means what a "not insubstantial" number of consumers say it means[3] — and with good reason. Advertisers, with few exceptions, don't intend their messages for lexicographers or judges. They intend them to be understood and responded to by consumers. Thus, how those consumers interpret the messages is of paramount importance. The Seventh Circuit's mystifying

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3. *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 317 (2d Cir. 1982) and cases collected at App. D, 42a n.4.

disregard for that fact contravenes what up until now has been an overwhelming consensus among courts and the one federal agency tasked with policing deceptive advertising. Mead Johnson respectfully urges that grant of its Petition is necessary to restore nationwide uniformity and the ability of the Lanham Act to effectuate the purposes for which it was enacted.

Respectfully submitted,

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